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No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1930

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

THOMAS D. THACHER,
Solicitor General.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

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Chief Counsel, Interstate Commerce Commission.

JANUARY, 1931.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, et al., appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 99) has not been reported.

The report of the Interstate Commerce Commission (R. 17) is reported in 155 I. C. C. 775.

QUESTIONS PRESENTED

The Interstate Commerce Commission, in a proceeding instituted on its own motion, entered an

order requiring carriers by railroad to cease and desist from the transportation or movement of private passenger-train cars, including so-called office cars, of other carriers free or at other than published tariff rates. Appellants filed a petition in the District Court to enjoin the Commission's order, asserting that, under a proper construction of the provisions of the Interstate Commerce Act, carriers have the right to transport free the private or office cars of other carriers, when occupied by persons using, and lawfully entitled to use, passes, and to perform accessorial transportation as incidental to such free transportation. The District Court dismissed the petition.

The questions which relate to the validity of the Commission's order, are:

1. Can the provisions of the Interstate Commerce Act giving carriers the right to grant personal passes to the officials and employees of other carriers, and their families, be so construed as to permit a carrier to transport free the private, or office, car of another carrier when the car is occupied by a pass holder, or (if moving "deadhead"[1]), when it is to be, or has been, occupied by a pass holder, despite the requirements of the Act as to publication and observance of tariff charges for trans-

[1] A substantial portion of the total mileage of private cars was shown to be "deadhead" mileage, "that is, the cars were not occupied, except in some instances by an attendant." "The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied." (R. 25 to 26; Appellants' Br. 7.)

portation of property and the prohibitions of the Act against unjust discrimination and undue preference?

2. Can such construction of the provisions permitting carriers to grant personal passes to officials and employees of other carriers be found in any past decision of the Commission and read by implication into the statute, as subsequently reenacted?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are, in the order discussed in the brief, paragraphs (1) and (7) of Section 6, Section 2, paragraph (1) of Section 3, paragraph (7) of Section 1 and paragraph (1) of Section 22, which read as follows:

> Sec. 6. (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules

printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. (C. 3591, 34 Stat. 586; C. 91, 41 Stat. 483; U. S. C. Title 49, Sec. 6(1).)

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier

charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges, or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (C. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (7).)

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be un-

lawful. (C. 104, 24 Stat. 379; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 2.)

Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (C. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 3 (1).)

Sec. 1. (7) No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for

Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families*; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers, subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, per-

sons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (C. 3591, 34 Stat. 584, 585; U. S. C. Title 49, sec. 1(7).)

SEC. 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or mu-

nicipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, *or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;* and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special

privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with

the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso. * * * (25 Stat. 855; U. S. C. Title 49, sec. 22 (1).)

STATEMENT

Appellants brought suit in the United States District Court for the Western District of Kentucky, sitting as a specially constituted three-judge court, to set aside and enjoin the following two orders of the Interstate Commerce Commission:

(1) Order entered by the Commission November 4, 1929, in No. 17757, *In the Matter of Use of Private Passenger Train Cars*, 155 I. C. C. 775, which required appellants and other carriers therein named to cease and desist "from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 10, 11.)

(2) Order made by the Commission, Division 4, July 30, 1929, amending in particulars, which will be hereinafter described, the Commission's Regulations to Govern the Form and Recording of Passes.

The proceeding, in which the first above-described order was entered, was instituted December 7, 1925, on the Commission's own motion pursuant to authority conferred upon it by Section

13(2) of the Interstate Commerce Act. (C. 309, 36 Stat., 551; U. S. C. Title 49, sec. 13 (2).) A questionnaire was sent to all Class I [2] and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The salient facts are that carriers transport free of charge the private, or office, cars [3] of other carriers when occupied by persons, for whose transportation the law permits a pass to be issued, such as the officials and employees of other carriers and their families; that they perform incidental, or accessorial, transportation free of charge (R. 8, 9), when the cars are not so occupied, as for example, in moving the car "deadhead" [4] to stations where they are to be occupied, in returning them "deadhead" to their home stations after occupancy, or in switching and storing the cars when awaiting occupancy (R. 25, 26, 24, Br. 7); and that the owning roads, or occupying pass holders, retain domin-

[2] Class I: Annual operating revenues above $1,000,000. In 1925 Class I carriers operated "about 91 per cent of the railroad mileage of the United States." (R. 2.)

[3] Hereinafter called private cars, whether being used for recreation or business.

[4] "Not occupied, except in some instances by an attendant." (R. 26.)

ion over such private or office cars, when moving or held on foreign roads, for their own particular use,[1] and the foreign roads are not at liberty to make other use of the cars (R. 35, 36). The further fact should here be mentioned that the carriers publish and exact certain minimum fares and surcharges (usually 25) for the transportation of privately owned, or chartered, cars, which are the same whether a car is occupied by 1 or 25 passengers. (R. 33, 34, 39, 49.)

On July 23, 1928, a proposed report was served upon appellants and all other carriers (R. 2) which reached the conclusion and finding that the practice of transporting free or at other than published tariff rates the private, or office, cars of other carriers was contrary to the provisions of the Interstate Commerce Act, and that it resulted in unjust discrimination and the according of undue preference. Subsequently the carriers named in the Commission's order of November 4, 1929, "appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had." (R. 10.) On June 21, 1929, the Commission issued its report in the proceeding, wherein it adopted the conclusion and findings recommended in the proposed report. The carriers were admonished that they would "be expected to cease and desist from

[1] Ticket passengers sometimes occupy the cars, but only by invitation of the occupying pass holder. (R. 35.)

the violations of the Act herein found" (R. 17 to 43), but no order was entered at that time. The order issued in the proceeding, namely, the above-described order of November 4, 1929, was entered after the carriers, against whom it is directed, had "waived any further or additional hearing before the Commission to that which had been given prior to said order" (R. 124, 10). In preliminary recitals contained in the order the findings made in the Commission's report (R. 39, 40, 42) were condensed to read as follows:

> 1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act to another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act.
>
> 2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and rates for the movement of privately owned or chartered cars, and
>
> 3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial (R. 10, 11).

The other order here involved, namely, that made July 30, 1929, "by the Commission, Division 4" (R. 44), amending the Commission's Regulations to Govern the Forms and Recording of Passes is not an order entered in the *Private Car Case*. Its making, however, was induced by contentions advanced in that proceeding to the effect that the form of pass prescribed by the then regulations, which included the word "car," covered foreign-line cars as well as home-line cars. (R. 26.) The Commission pointed out reasons why such interpretation could not properly be attributed to its form of pass, but, in order to remove the matter beyond dispute, it added by its amendment the express statement that "a car pass may be issued only for cars owned by the issuing carrier or held by it under lease" and that "it may not be issued for other cars."

December 14, 1929, appellants filed their petition to enjoin the two orders of the Commission above described. (R. 1.) The case was argued and submitted as on final hearing on the application for permanent injunction. May 28, 1930, the court rendered its opinion upon final hearing. (R. 99.) June 18, 1930, final decree was entered, dismissing the petition. (R. 107.)

SUMMARY OF ARGUMENT

I. Appellants' admitted practice of transporting free and without publication of tariff charges the private cars of other carriers, when occupied by

officials of the owning carriers or other persons for whose transportation the law permits a pass to be issued, and of performing free incidental "deadhead" transportation, in returning such cars to their home stations, or in moving them to stations where they are to be occupied, violates the prohibitions in section 6 of the Interstate Commerce Act against transporting property unless charges for its transportation had been published and filed and against the giving to any person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

1. Appellants' contention that the private car of one carrier on the line of another is not "property" subject to transportation charges, when occupied by a person traveling on a pass because, under such circumstances, it becomes the foreign line's own facility of transportation is contrary to the law and the facts. While freight cars and passenger cars under revenue load are customarily not subject to transportation charges on foreign lines the reasons for that are that they are moving in through service under joint or through rates and that a rental is paid by the foreign line for their use. As distinguished from such movements, rolling equipment of all kinds is subject to transportation charges on foreign lines when transported for the sole benefit of the owners, and this is given recognition in the tariffs of appellants and all carriers. Under the

"private-car practice" of the carriers, the owner or pass holder retains dominion of the car for his own exclusive purposes and a foreign line can not make other use of the car, whether transporting it occupied by a pass holder, whether transporting it "deadhead" or whether holding it on its line awaiting occupancy by a pass holder; and, of course, no rental is paid for a private car which a foreign line is transporting free of charge for the benefit of another.

2. That private cars of individuals or corporations are recognized by appellants and other carriers as "property" subject to transportation charges is shown by the fact that, for "privately owned or chartered cars," the tariffs name a fixed number of fares and surcharges (usually 25) regardless of whether 1 or 25 persons are to occupy. The only material difference between these cars and the private cars of carriers occupied by a pass holder, is the matter of who owns or is using them. The application of the prohibitions in section 6 of the Act against transporting property without publication of tariff charges and against extending to any person any privileges or facilities except as specified in published tariffs can not lawfully be made to depend upon ownership of the property transported, or upon the individual for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole is to do away with discriminations based on any such distinctions.

3. The evil of discrimination was the principal thing aimed at by the Act to Regulate Commerce, and the prohibitions in section 6 against transportation of property unless tariff charges therefor had been filed and published was enacted by Congress as the most effective method of putting a stop to that evil. Appellants' contention that the private car of one carrier on the line of another is the latter's own facility and not property subject to transportation charges when it is occupied by a pass holder would make of the provision permitting issuance of passes to specified persons an instrument for the evasion of the fundamental purpose of the Act.

II. Despite the fact that the exceptions in section 1 (7) and section 22 of the Act permit of free transportation of specified individuals, transportation services rendered them free of charge, which is not covered by the manifest purpose of the exceptions, may in law, and does in fact, subject paying passengers to unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act.

III. All of appellants' contentions, despite the differences in underlying reasoning, present the single question as to whether the exceptions in the Act, which permit of free transportation of specified individuals, permit also of free transportation of private cars. Such construction of the exception would disregard the elementary rule that exceptions from a policy embodied in a statute must

be narrowly construed; it would in fact add to the Act an entirely new exception.

IV. The principle of statutory construction whereunder the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently re-enacted without change in the particulars so construed, which appellants have invoked in defense of their practice, is inapplicable because the language of the statute is plain and unambiguous and because the Commission has not given to the statute the interpretation contended for by appellants.

ARGUMENT

I. APPELLANTS' PRACTICE OF TRANSPORTING FREE THE PRIVATE CARS OF OTHER CARRIERS IS NOT EXCEPTED FROM THE REQUIREMENTS OF THE INTERSTATE COMMERCE ACT AS TO PUBLICATION AND OBSERVANCE OF TARIFF CHARGES FOR TRANSPORTATION OF PROPERTY OR FROM THE PROHIBITIONS OF THE ACT AGAINST UNJUST DISCRIMINATION AND UNDUE PREFERENCE BY VIRTUE OF THE OCCUPANCY OF THE CARS BY PERSONS FOR WHOSE TRANSPORTATION THE LAW PERMITS A PERSONAL PASS TO BE ISSUED

Assembling in summarized form the provisions of the Interstate Commerce Act here involved: Section 6 requires the carriers to file and publish all rates or charges for transportation between points on their own lines and between points on their own lines and points on the lines of other carriers. It forbids a carrier from transporting

property or passengers unless the rates or charges upon which same are transported have been filed and published; from charging any different compensation than that specified in the published tariffs and from extending to any shipper or *person* any privileges or facilities except such as are specified in its tariffs. Section 2 forbids any unjust discrimination in charges for transportation of property or persons under substantially similar circumstances and conditions. Section 3 forbids the giving of any undue preference or advantage to any person or corporation or any particular description of traffic in any respect whatsoever. The only exceptions in any way qualifying the above requirements and prohibitions are: (1) As to property, section 22 contains an exception, which permits transportation free or at reduced rates for the United States, for the States and Municipalities, and for certain charitable purposes; and (2) as to persons, section 22 and paragraph (7) of section 1 contain exceptions to the prohibitions against "free passes" or "free tickets," which permit the carriers to grant passes for certain charitable purposes and for certain other named purposes, with which we are not here concerned, and permit them to grant passes to their own officials, employees and their families, *and to interchange passes for the officers, agents, and employees of common carriers, and their families.*

Appellants admit that, prior to the Commission's decision herein involved, it was their practice to

transport the private car of another carrier free of charge and without publication of tariff charge for its transportation "when occupied by a person using, and lawfully entitled to use, free transportation," namely, an official of the owning road, or other person for whose transportation the law permits a pass to be issued. (Br. 7.) Moreover, if the official of the owning carrier, or other pass holder, made a stop at a pleasure resort or at a business center, it is clear that the car had to be either switched and held on the foreign line (as the office of the owning carrier's official, when on business) or returned to its home line. If it was returned to its home line, it had to be transported back to the pass holder for his return from his trip. Appellants' defense of this latter practice is, apparently, that such transportation was accessorial or incidental to transportation that had been, or was to be, performed with an official of the owning carrier, or other person traveling on pass, in occupancy of the car. (Br. 7; R. 8.) In justification of the practice as a whole, they state that a railroad official must frequently travel on business to points on other carriers' lines and must have with him "considerable records, files, correspondence, papers, profiles, blue prints, and necessary clerical forces" * * *. "He takes them in what is known as a private, office, or business car and this car is in reality the same as his office." (Br. 11.) As to the free transportation of private cars for

officials of other roads, or members of their families, traveling for recreation, appellants rely upon the occupancy of the car, present, past, or prospective, by an individual for whose transportation the law permits a "free pass" or "free ticket" to be issued.

Obviously, application of the Act's prohibitions against transporting property without tariff charges on file, against extending to any person any privileges or facilities except as specified in published tariffs, against unjust discriminations and against the giving of any undue preference "in any respect whatsoever," can not be lawfully made to depend upon ownership of the property transported, or upon the individual for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole was to do away with discriminations based on any such distinctions. *Houston, etc., Ry. v. United States*, 234 U. S. 342, 356. The Act makes no exceptions permitting carriers to favor other carriers in the transportation of property (*Int. Comm. Com. v. B. & O. R. Co.*, 225 U. S. 326) and the exception permitting interchange of passes for officials and employees of common carriers clearly can not be construed to allow of the free transportation of a whole private car as well as the person of a passholder. Such construction would be contrary to the manifest purpose of the exception. *Nashville, Chattanooga & St. L. Ry. v. Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule

that exceptions from a policy embodied in a statute must be strictly construed. *Spokane & Inland R. Co.* v. *United States,* 241 U. S. 344, 350. It would, in fact, add to the Act an entirely new exception. *L. & N. R. Co.* v. *Mottley,* 219 U. S. 467, 479.

1. Rolling equipment of every kind is recognized by appellants and all carriers as "property" subject to transportation charges under section 6 when transported as the property of another[6] and for his sole benefit; the private car of another carrier can not be placed in a different category by virtue of its occupancy by an individual using, and entitled to use, a personal pass

Giving separate consideration to section 6 of the Act, paragraph (1) thereof requires the carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of other carriers. Because of its importance, paragraph (7) of said section is again set forth in full, and reads as follows:

> No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or

[6] Where the owner or charterer retains dominion over the car for his exclusive purpose.

> demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

In short, a carrier is forbidden to transport property unless the charge for its transportation has been filed and published. It can not charge or receive a greater or less or different compensation than that specified in its tariff rates, directly or by any indirect means. It is forbidden to extend to any shipper or *person* any privilege or facility in the transportation of passengers or property except such as are specified in its tariffs.

The violations of Section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation and extended to persons privileges or facilities not named in their tariffs. Those violations are of the provisions of the Act itself, which surely must be as strictly observed as tariffs filed in furtherance of said provisions. If the transportation of private cars here involved were for noncarrier corpora-

tions, or for persons not traveling on passes, it may be assumed that appellants would not contend that, by neglecting to publish charges therefor, they would become privileged to perform the transportation free of charge.

In *Legality of Express Frauks*, 50 I. C. C. 599, it was said:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. (See sections 2, 3, and 6. * * * Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, this court said at pages 478 and 479:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions *of existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of pas-

> category of property that was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forebore to make such an exception.

As heretofore shown, the Act's only exceptions permitting of free transportation of property are confined to transportation of property for certain governmental and charitable purposes. Appellants do not contend that the transportation of private cars of other carriers falls within any of those exceptions.

Moreover, appellants do not dispute the fact that rolling equipment of every kind is "property," subject to transportation charges under section 6 of the Act when transported as the property of another carrier and for its sole benefit. Their contention is that a private car of one carrier on the line of another is not "property" subject to transportation charges when occupied by a person traveling on a pass because, under such circumstances, so they allege, it has become the facility of transportation of the foreign line. It is their further view, apparently, that when the car is transported "deadhead" by the foreign line, in returning it to its home station or in moving it to a station where it is to be occupied (Br. 7) and when "accessorial" switching and storage service (R. 24, 26) is performed pending actual use of the car by an official of the owning line, for whose transportation the law permits a pass to be issued,

the car still is the foreign line's facility of transportation. Appellants do not dispute the fact that the foreign line does not pay "per diem" or other rental for such car. (R. 36.) Their contention that it is the foreign line's facility of transportation seems rather to rest on the theory that it is made such by the mere fact that it is accepted for transportation along with an individual for whose transportation the law permits a pass to be issued. But the objection to this is that the facts show that dominion over private cars, transported and held on foreign lines, is at all times retained for the particular uses of the owning carrier, or of its official or other person traveling on a pass. (R. 31, 35, 36.)

In connection with appellants' contention, the circumstances under which equipment of another carrier is "property" subject to transportation charges and those under which it may be lawfully treated as part of a foreign line's own instrumentalities of transportation should be considered. Of course a carrier can haul its own cars or, for that matter, any other of its own property, such as road materials, fuel, and the like, without tariff charge, as it would serve no useful purpose to require it to transfer money from one pocket to another. And also, equipment which it has rented and is using in revenue service is not subject to transportation charges on its line. For example, freight cars move freely on foreign lines in maintaining through service under joint or through rates.

They are interchanged under rules of the American Railway Association, whereby the carrier in possession pays to the owning carrier a certain amount called a "per diem" for each day the car is on its line. The "per diem" is in effect a rental, and it is paid whether the car is loaded or empty, as the return-empty movement is regarded under the tariff charges as incidental to the loaded movement. The carrier in possession has the right to load a foreign car with revenue freight (R. 32), which circumstance is in sharp contrast with the fact that a foreign line can not make use of a private car of another moving "deadhead" on its line, or held on its line awaiting occupancy. Passenger cars are also to some extent operated over the lines of other carriers in maintaining through service. This is done either under contract, or, in the absence of contract a "per diem," or certain amounts per mile, are paid as rental by the foreign line under rules of the American Railway Association. (R. 33.) In regular revenue service, then, cars of other lines are not subject to tariff charges, for they are rented by the carrier in possession. Privately owned freight cars, such as coal cars and refrigeration cars, are also used by the carriers, but that use is for revenue-producing purposes and the carriers pay the owners an allowance therefor. (R. 33.) As to Pullman cars, the railroads employ the Pullman Company to perform a service for them; the cars are in effect hired and the railroads have the

exclusive right to the use. *Chicago R. Co.* v. *Pullman Co.*, 139 U. S. 79, 89, 95. *Worcester Car Co.* v. *Penn. R. Co.*, 3 I. C. C. 577, 588.

On the other hand, cars transported as the property of another and for his benefit are regarded as "property" subject to transportation charges. The consolidated classification, filed with the tariffs, provides charges per car per mile for transportation of all kinds of railway equipment on their own wheels. They apply on new cars moving from place of manufacture, on cars moving to and from repair shops off home lines, and on any other movements over foreign lines not in regular service. (R. 32, 33.) A car, then, although a vehicle of transportation, still is recognized as property subject to transportation charges when transported by a carrier as the property of another and for his benefit. That private passenger cars of individuals or corporations are similarly recognized as "property" subject to transportation charges is shown by the fact that, for "privately owned" or chartered cars, the tariffs name a fixed number of fares and of surcharges (usually 25) regardless of whether one or twenty-five persons are to occupy, and that they also call for a minimum flat charge.[7] (R. 33, 34, 40.)

[7] This disputes appellants' theory that the word "property" as used in section 6 refers only to consigned freight. A car is property and if it should be consigned, that appears entirely practicable.

The practice in respect of private cars of carriers on foreign lines is lacking in the elements which would constitute them the foreign lines' facilities of transportation. Such cars are not the hired cars of foreign roads over which they move, since the latter, of course, pay no rental for cars which they are transporting without charge and in non-revenue producing service. (R. 36.) Moreover, if appellants' contention that the cars are the foreign roads' equipment is based on the theory that their use is borrowed, the borrowing is of peculiarly restricted character.* Just as private individuals retain the right to the exclusive use of their private cars when transported at tariff charges, the owning carriers of private cars, moving or held on foreign lines, or the occupying officials, retain dominion over the cars for their own particular uses; and the foreign roads are not at liberty to make other use of the cars.

Appellants' theory that such use as is made by a foreign road of a private car in transporting it for the owning road, or for its official or other individual entitled to a personal pass, causes the car to

* Decisions which have held that carriers are left free to furnish their own equipment, whether by purchase, by construction, or by contract (*Chicago, St. L. & N. O. R. R. Co.* v. *Pullman Co.*, 139 U. S. 79; *Scofield* v. *Lake Shore & Mich. So. Ry. Co.*, 2 I. C. C. 118; *Worcester Excursion Car Co.* v. *Penna. R. R. Co.*, 3 I. C. C. 584, 588), clearly are not applicable to show that, where the owner or occupant retains dominion over the car for his own purposes, the car becomes the transporting carrier's own equipment, either leased or borrowed.

undergo a transition from the status of property transported for another to the status of the foreign lines' hired or borrowed facility of transportation would make of the exception permitting free transportation of certain persons an instrument for the evasion of the fundamental provisions of section 6, which require publication and observance of charges for transportation[1] of property and forbid a carrier to extend to any person any privileges or facilities except such as are specified in its published tariffs.

The case of *N. Y. & New Haven R. Co. v. Int. Com. Com.*, 200 U. S. 361, forcefully illustrates that the courts will not permit the transportation service performed by one carrier for another to be so confused with its other dealings with that carrier as to defeat the charges which it is required by statute to exact, even from another carrier. In that case there was involved a contract of the Chesapeake & Ohio with the New Haven, whereunder the former purchased coal in West Virginia and

[1] The word "transportation" is, of course, not used in section 6 in the limited sense of its original Latin derivation. For example, pipe-line companies are included among the carriers, which are required by section 6(1) to publish charges for transportation. Oil is "pushed" or "hauled" through pipe lines by pressure or suction pumps. In fact, "transportation" includes both the movement of the property and incidental service as well. In this connection the variety of office records and equipment carried in the car (Br. 11) should be considered. Many articles so carried free are specifically subject to charges under the carriers' tariffs. (R. 31.)

delivered the same to the New Haven at a price, which it was shown did not cover the cost of purchase and published freight rates. The decision in the case sustained the Commission's contention that the transaction effected a departure from published rates.

In *Int. Com. Com.* v. *B. & O. R. Co.*, 225 U. S. 326, involving transportation by one carrier of fuel coal to another carrier, this court held that a railroad can not be made a favored shipper and given lower rates than other persons.

The first of the above cases involved departures from tariff rates, whereas the instant case is, as above explained, rather one of violation of the basic provisions of the Act. But surely the statute has as much dignity as the tariffs required to be filed in furtherance of its purposes. That is, just as the carriers may not depart from the rates which they are required to exact, so likewise they can not accomplish the same result by excluding, or failing to include, in their tariffs charges for transportation of property, contingent merely upon ownership or upon the person for whom the service is performed. Compare *Int. Com. Comm.* v. *Del. L. & W. R. R.*, 220 U. S. 235, 249. The Act commands all charges for transportation of property to be filed and published and forbids its transportation unless such charges have been filed.

In *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, this court said at page 597:

> The chief purpose of the Act (Act to Regulate Commerce, 24 Stat. 379) was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed.

Compare *Davis* v. *Cornwell*, 264 U. S. 560; *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155.

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, it was said (p. 442) that the amendments made by section 2 of the Hepburn Act of 1906 (c. 3591, 34 Stat. 586) to section 6 of the Act to Regulate Commerce show that Congress had come to believe

> that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment but for all shippers and shipments; not for one time only but for all times.

The decisions in the *New Haven case* and in the *B. & O. case* show that railroads can not be regarded as favored shippers—exempted from the prohibitions of section 6. The exception permit-

ting interchange of passes for free transportation of certain persons can not be construed to permit also of free transportation of a whole private car for the passholder; that is, it can not be construed to exempt the transportation of the car from the requirements of section 6 as to publication and observance of tariff charges on the ground that it is to be transported for an individual entitled to a personal pass. Such construction can not be convincingly urged, either directly or indirectly, by asserting that the car is the foreign line's own facility of transportation by virtue of its occupancy by an individual traveling on a personal pass.

The use made of a private car by a foreign line consists of transporting the car, its varied contents,[10] and occupying pass holders, of transporting the car "deadhead" back to its home station or to stations where it is to be occupied (Br. 7) and of performing other accessorial transportation services above mentioned, *all free of charge and all for the benefit and particular purposes of the owing carrier,*[11] *or its official or other person traveling, or expecting to travel, on a pass.* Appel-

[10] "Records, files, correspondence, papers, profiles, blueprints" (Br. 11), "chinaware, foodstuffs, and furniture." (R. 31.)

[11] The private records and other articles in the car show that it is no more borrowed equipment of the foreign line than is a "privately owned or chartered" car, for the transportation of which the tariffs name charges. (Br. 67.)

lants' theory that such use, made by a foreign line of the car of another, constitutes its own facility of transportation and renders its transportation for the owner or occupying pass holder not subject to tariff charge, if adopted, would tend materially to defeat the purposes of section 6.

The chief purpose of the Act to Regulate Commerce was to do away with the evils of preferences and discriminations (*Kansas City Ry. Co.* v. *Albers Comm. Co., supra; Houston, etc., Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342, 356), and the prohibition in section 6 against transporting property until tariff charges therefor had been published and filed was considered by Congress to be the most effective method of putting a stop to those evils. *Southern Ry. Co.* v. *Reid, supra.* Appellants' contention that the exception, permitting issuance of "free passes" or "free tickets" for certain specified persons, permits also of free transportation of private cars is "in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed." *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 350. Indeed the construction of said exception urged by appellants in effect asks of the court that it add an entirely new exception; which this court has held it could not do "when Congress forebore to make such exception." *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467, 478.

Officials of industrial common carriers make a considerable use of the private-car privilege on foreign lines for noncarrier purposes; that is, for the benefit of the industry which controls the carrier. (R. 22 to 27.) Assume that an official of an industry had not become an official of the carrier principally serving the industry, it is clear that his purchase of a single ticket would not entitle him to free transportation of his private car over the trunk lines on any theory that the car was the facility of transportation of each railroad in turn transporting the same. And yet, if such use as is made by a foreign road of the private car of another carrier, in accepting it for transportation along with an official entitled to a personal pass, makes the car its facility of transportation, equally it would seem that, if a "privately owned car" were accepted for transportation along with the holder of a single ticket, it would no longer be "property" subject to transportation charges because it had become the carrier's facility of transportation. As heretofore said, the tariffs of appellants and other carriers name charges (a minimum of 25 fares and surcharges) for transportation of privately owned or chartered cars, but it may be assumed that appellants will not contend that, by neglecting to make such provision in their tariffs, they would become privileged to transport a privately owned car free, if occupied by a single ticket holder.

2. The commission's order rests not only upon its decision that the practice of the carriers is in violation of section 6 but also upon administrative findings that it results in unjust discrimination and the giving of undue preferences

The decision of the Commission was not only that the practice of appellants and other carriers contravened the provisions of section 6 of the Interstate Commerce Act, but also that it resulted in unjust discrimination and undue preference. In this latter connection the Commission made the following finding:

> That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars. (R. 10.)

This finding is based on the provisions of section 2 of the Act (page 5, *supra*) which forbid unjust discriminations in charges and upon the still broader language of section 3 which reads:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or un-

> reasonable preference or disadvantage in any respect whatsoever.

The scope of the above language is certainly sufficiently comprehensive to support the Commission's finding that appellants' admitted practice (Br. 67) of transporting free the cars of other railroads when occupied by an individual entitled to a personal pass while charging a minimum of 25 fares and surcharges for transportation of private cars owned or chartered by other passengers, is unjustly discriminatory and unduly preferential and prejudicial.

In *Houston, etc., Ry.* v. *United States*, 234 U. S. 342, speaking of section 3, the Court said at p. 356:

> This language is certainly sweeping enough to embrace all the discrimination of the sort described which it was within the power of Congress to condemn.
>
> * * * * * *
>
> It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory act or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it.
>
> "The provisions of the Bill are based upon the theory that the paramount evil charge-

> able against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *." (Senate Report No. 46, 49th Cong., first sess. p. 215.)

What constitutes unjust discrimination or undue preference is, of course, a question of administrative fact for the exclusive determination of the Commission. *Virginian Ry* v. *U. S.*, 272 U. S. 658, 663; *Procter & Gamble* v. *U. S.*, 225 U. S. 282, 297–298; *O'Keefe* v. *U. S.*, 240 U. S. 294, 302–304; *C. R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 33–34.

> (a) The lower court's decision sustains the findings made by the Commission and does not rest upon a new finding of its own.

In anwer to appellants' argument that, inasmuch as there can be no discrimination or preference under the Act except between persons or articles of the same class preferential treatment of the passholder can not constitute a violation of the Act, the lower court said:

> Pass holders and paying passengers are of the same general class—they are all passengers. It costs no more to transport one than the other. The pass holder is lifted out of the provisions of the Act only to the extent that he does not have to pay the usual and ordinary transportation charges exacted of other passengers. In every other respect

> he is on the same footing as other passengers, and if the facilities afforded him are found by the Commission, upon substantial evidence, to amount to an unjust discrimination or an undue or unreasonable preference, the Commission has the power under the Act to deal with the matter without interference from the courts. (R. 106.)

Appellants refer to this conclusion of the lower court as an initial finding of administrative fact that their practice results in discrimination as between pass holders and pay passengers. (Br. 82, 83.) That is, they assert that the Commission's findings did not cover discrimination as between pass holders and pay passengers and that, therefore, since it is an established principle that the courts can not preliminarily pass upon questions of administrative fact, the lower court erred in giving consideration to possible discrimination of such character.

What was condemned by the Commission's order, by its findings and by its whole report was the practice of appellants as it found it. Their admitted practice was to transport free the private cars of other carriers "when occupied by a person using, and lawfully entitled to use, free transportation" and to perform free accessorial transportation "as an incident to *such* free transportation," namely, "the movement of such car to the point on the moving carrier's line where the free transportation is to begin or, after the free trans-

portation is over, the movement back to the owning line." (Br. 7; R. 8, 9.) As shown by the record, by their said admission and by their contentions here and throughout, this practice of appellants was conducted under color of right assumed to be derived from the proviso or exception permitting them to issue passes for the officials and employees of other carriers and their families. As shown by the lower court's opinion (R. 106), its conclusion that pass holders and paying passengers are of the same general class was occasioned by appellant's contention that "preferential treatment of the pass holder can not constitute a violation of the Act." The Commission sets forth in its report instances of operating officials and directors traveling on passes in private cars both on business of the carrier, and for their own pleasure, instances of members of their families traveling on passes in private cars (R. 19 to 21), instances of widows of deceased officials or directors traveling on passes in private cars, (R. 26, 27) and even instances of such individuals traveling on passes in their own cars (R. 26, 27).

In light of the above it seems improbable that appellants' statement that the difference in treatment of pay passengers and pass holders "was not even discussed, much less passed upon by the Commission," is intended to mean that the Commission's report and findings did not treat of pass holders as those given undue preference by their practice. Moreover, when a railroad employee

travels on railroad business it is passenger travel of his employer in the same sense as is the every-day travel by employees of thousands of business concerns the passenger travel of their employers.

As bearing directly on the contention of appellants the Commission's report read as follows:

> As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenues are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them. In so far as these charges do not apply to the private cars of other carriers, they are unjustly discriminatory and unduly preferential and prejudicial. (R. 39, 40.)

The statement in the above that "apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who *owns or is using them*" is a condensed statement of the discrimination covered by the Commission's

findings and against which its order is directed. The words "who owns or is using them" show clearly that the Commission had in mind both the carrier and the passholder passenger as those to whom the carrier's practice gave undue preference. And the person subjected to undue prejudice by their practice is, of course, the paying passenger in that he can not obtain like service or privilege at usual passenger charges but must pay the "minimum charges" for transportation of a special, privately owned, or chartered passenger car.

Probably appellants are confused as to the basis of the Commission's findings because of the fact that, while a car is property subject to transportation charges when transported for another, it is not an industrial product at the moment under transportation to market in commercial competition. It is property already marketed and in use, and its transportation for the owner or user can be more closely likened to the transportation free for a passenger of excess baggage, or of articles which, under the tariffs can not be checked as baggage, such as bicycles or automobiles. (R. 31.)

The lower court, before stating its conclusion that passholder passengers and paying passengers are of the same general class, had said that it seemed wholly immaterial to it whether a private car be regarded—

> "as an article of commerce when moving over the line of a non-owning carrier, or as

> a transportation facility of the moving carrier. If it is an article of commerce, it is being transported free for the benefit of the passholder; if it is a transportation facility of the moving carrier, it is being furnished free to the pass holder." (R. 105.)

A still closer analogy to the instant case than that of baggage would be presented, if we were to assume that appellants' tariff charges on privately owned or chartered cars, in addition to excluding (or failing to include) carrier-owned private cars, expressly excluded the privately owned or chartered cars, for example, of all lawyers. In such case, could it be said that a lawyer traveling for recreation in a chartered car was not given a preference over paying passengers covered by the tariffs, if the railroads performed the transportation on a single passenger ticket? In the event that he was traveling on business of an employing firm of such kind as necessitated his having with him voluminous records and a stenographer, could it be said that his employer was not given a preference, if the railroads transported the car and the two employees on two passenger tickets?

> (b) Undue preference and prejudice may exist in respect of passenger travel regardless of the particular purposes for which passengers are traveling.

In further attack upon the lower court's conclusion that—

> "Pass holders and paying passengers are of the same general class—they are all pas-

> sengers. It costs no more to transport one than the other,"

appellants contend that, since passholders are by law made free passengers, passholders and paying passengers are not members of the same class, between whom the Commission could find the discrimination to be unjust. This contention will be discussed in the next chapter of this brief. Appellants also contend that, before the Commission can find undue preference and prejudice in passenger travel, the passengers involved must be of the same class in the narrow sense of being engaged in competitive commercial travel. (Br. 73, 74.) Any such construction of sections 2 and 3 of the Act would make their provisions unworkable in respect of passenger travel. Many passenger trains run daily between New York and Washington, and between other cities, carrying passengers traveling for recreation purposes of many kinds, for educational purposes of many kinds, for business purposes of many kinds (sometimes their own but more often an employer's) and for many other purposes. All such passengers are clearly entitled under the Act to equality of service for the same charges and to equality of charges for the same service without inquiry by the Commission into the particular purpose of the travel of each.[12]

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[12] Persons traveling at party rates, commutation rates, or excursion rates are in a different class from ordinary passengers for reasons which justify the differentiation from a transportation standpoint.

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, involving the validity of an order entered by the Commission for the purpose of removing discrimination against interstate commerce caused by the low level of intrastate fares, this court said at page 579:

> We have two questions to decide.
>
> First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?
>
> Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?
>
> We shall consider these in their order.
>
> First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. * * *[13]

In view of the broad general class of passengers traveling in interstate and intrastate commerce, it is clear that this statement could not have been made if it were true that, before the Commission

[13] The validity of the order as a whole was sustained on the second ground, namely, that the low level of intrastate fares cast a burden on interstate commerce in that they did not yield their fair share of the revenue necessary to maintain an efficient transportation service.

can find unjust discrimination in respect of passenger travel, it must inquire into the varied purposes of travel of the passengers to determine whether, as between each and all of those given a preference and each and all of those subjected to prejudice, there exists competitive commercial grounds upon which to base a finding that the discrimination is unjust and undue.

Another contention of appellants should be mentioned, although it does not appear to be directed against anything which the Commission's orders require to be done. They refer to the Commission's order (Division 4) amending its Regulations to Govern the Form and Recording of Passes, wherein it is stated that a car pass may be issued only for cars owned by the issuing carrier or held by it under lease, and assert that this by necessary implication permits "the continued use of free transportation in a carrier's own office car and the consequent giving to a pass passenger different and better accommodations than to a pay passenger." (Br. 84.) Presumably appellants consider that the amendment to the Commission's prescribed form of pass expressly permits them to haul free in their own private cars not only their own officers and employees [14] but also the officers and employees

[14] It is doubtful whether officers or employees of a carrier traveling on its business, in its car and on its line, can be classified as passengers any more than can conductors or brakemen. As to those instances when they or their families are given free transportation for recreation purposes in the

of other carriers, members of their families and other persons of the excepted classes specified in the Act. Whatever may be the proper implication to be drawn from the amendment, the use by appellants and other carriers of their own equipment to give undue preference to individuals entitled to personal passes would be subject to correction by further order of the Commission. The Commission's order entered in the *Private Car case*, forbidding transportation of the private cars of another carrier free of charge, was intended to reach, and does reach, substantially all unjust discriminations shown to have their source in the then practice of the carriers. It is apparent, moreover, that this argument of appellants "is directed not to what the order requires to be done but to what it does not require." *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483.

3. The exception permitting issuance of passes for free transportation of specified individuals must be construed "with due regard to its manifest purpose" and, when so construed, it does not permit of free transportation of a private car along with the individual

Appellants' contention that a private car of one carrier on the line of another is the latter's facility of transportation and not property subject to transportation charges under section 6 of the Act, when

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car of their employer and on its own line, there would seem to be a distinction between their travel and that of an ordinary passenger sufficient to account for the fact that the discrimination was not considered to be undue.

the car is occupied by a passholder, or (if moving "deadhead") when it has been, or is to be, occupied by a passholder, is made in reliance upon the exception to the prohibition against "free passes" or "free tickets," which permits of passes for the officers and employees of common carriers, and their families or upon the exception of like purport in section 22. Their contention that their practice of transporting such cars free is outside the Commission's jurisdiction over unjust discriminations and undue preferences under sections 2 and 3 is also clearly made in reliance upon said exception, since it is based on the assertions that there can be no unjust discrimination except between members of the same class and that passholding passengers and paying passengers can not be said to be of the same class because the former are by law made free passengers.

Despite the differences in the underlying reasoning both contentions present the single question as to whether the exception permitting issuance of passes for free transportation of specified individuals permits of free transportation of private cars as well.

In *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323, this court said, in speaking of the exception in section 22 permitting of free transportation of property for the United States and local governments:

> "Section 22 must in this matter, as in others, be read in connection with the rest

> of the Act, and be interpreted with due regard for its manifest purpose."

In *American Express Co.* v. *United States*, 212 U. S. 522, the United States had obtained an injunction to restrain the express companies from issuing franks for free transportation of property to their own officers, employees, etc., or to the officers and employees of other express companies or other carriers. Express companies, as well as railroads, are carriers subject to the Act. The United States contended that the only exceptions permitting of the free transportation of property are those contained in section 22 allowing free transportation for the United States, the States or Municipalities, or for charitable purposes. The Express Company relied largely upon the exception to the prohibition against "free passes" or "free tickets," which permits of passes for officials and employees of common carriers. The lower court granted the injunction. In affirming the decree, this Court said:

> We are clearly of the opinion, that, without doing violence to the language used in section 1—including the proviso—its terms can not be held to include the transportation of goods.

Moreover, as repeatedly said, the provisions permitting issuance of passes for specified persons constitute exceptions to the basic purposes of the Interstate Commerce Act "to compel the carrier as a public agent to give equal terms to all," "to cut

up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Union Stock Yards*, 226 U. S. 286; and *Assigned Cars for Bituminous Coal Mines*, 93 I. C. C. 701, 718. Sections 2, 3, and 6 are all directed to those ends and the Elkins Act (32 Stat. 847) further emphasizes the purpose to put an end to all discriminations. The rule is well settled that exceptions from a general policy which a law embodies must be narrowly construed.

In *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be *in plain disregard*

> *of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.*

Indeed appellants' construction of the exception permitting free transportation of specified persons to include as well the free transportation of private cars, and the "deadhead" movements and switching and storage incidental to their use can not be properly termed a broad interpretation; rather it adds to the Act an entirely new exception.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the underlying facts were that appellant railroad had settled for injuries suffered by the appellee and his wife in a train wreck by agreeing to give them passes during their lives. It honored this agreement for some years, but, following the amendments made to the Act to Regulate Commerce by the Hepburn Act of 1906, it took the position that, to do so longer, would subject it to penalties for violation of the law. The decision in the case sustained appellant's view of the law. At pages 478 to 479 it was said:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions

> *of existing contracts,* it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

As distinguished from the free transportation of private cars in the instant case, which, like the contract for free transportation in the *Mottley case,* is entirely outside of any exception in the Act, the decision in *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, shows that even as to transportation, which, by virtue of an express exception in the Act may be performed free, the privilege may not be exercised in all cases. The facts involved in this case were that the Commission had made a general increase in interstate rates and thereafter the Tennessee State Commission had made like increases in state rates except upon "carload shipments of stone and gravel when for use in building public highways and consigned to federal, state, county, and municipal authorities." Upon complaint of the carriers the Commission found that such exception from the increase in rates resulted in unjust discrimination and undue prejudice to persons and localities engaged in interstate commerce and, pursuant to its authority under section 13 (4), ordered such rates increased to the level of

interstate rates. The State and its Commission instituted suit before a three-judge court to enjoin the order, relying upon the exception (supra, p. 8) in section 22, which permits transportation of property free or at reduced rates for the United States and for the States and Municipalities. The lower court granted the injunction, holding that by reason of said exception the Commission was "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight"; that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control, in still other words, there is freedom of discrimination."

Upon appeal this court reversed the decree. The paragraph in the decision, which discusses the effect that may be properly attributed to the exceptions in section 22 of the Act, is of particular interest and reads (p. 323):

> Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object

> of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. Its limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

In the above it is said that the section "limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act" and that "by so doing it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases." The qualifying words "in certain cases" are noteworthy. Moreover it will have been noted that every sentence in the paragraph contains language qualifying the discretion left with the carriers by section 22. For example, it is stated Congress did not intend to create an instrument giving the carriers discretion to subject interstate commerce to undue prejudice; that the object of the section was to settle that preferential treatment of certain classes of shippers and trav-

ellers *in the matters therein recited* was not *necessarily* prohibited, and that the section "must in this matter, as in others, be read in connection *with the rest of the act,* and *be interpreted with due regard to its manifest purpose.*" This qualifying language taken together with the facts, of predominating importance, that, despite the exception in section 22 permitting transportation free or at reduced rates for a state, there is not freedom of discrimination in respect thereof, shows that appellants' contention that the exception permitting free transportation of specified individuals so removes such transportation from the provisions of the Act that private cars may be transported free along with the individual, is unfounded. In passing, the Court's attention is also called to the fact that in the above case the Commission's authority was sustained even though trenching on the reserved powers of a state, in respect whereof the rule is that Federal legislation shall only be taken to supersede local authority to the extent required by the Federal act in express and plain terms. *Ill. Cent. R. Co.* v. *P. U. Comm.,* 245 U. S. 498, 510; *Savage* v. *Jones,* 225 U. S. 501, 533.

Appellants' contention that, because the Act permits them to grant passes to certain persons, unjust discrimination as between pass-holder passengers and paying passengers can not at law be said to be caused by transporting private cars free for the former, if logically followed out, would permit them to grant special train service for a pass

holder, including expedited service and even priority of movement in times of congested traffic and all manner of other preferences. This is too much to read into a provision which merely permits of the granting of personal passes to the officials and employees of another railroad and is, moreover, an exception to the general policy of the Act to cut up by the roots every form of discrimination and favoritism. *L. & N. R. Co.* v. *Mottley, supra.*

II. NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS

The final ground asserted by appellants against the validity of the Commission's order is that the Commission has in the past sanctioned the practice of the carriers in moving free the private cars of another carrier, and that Congress has impliedly ratified and recognized such practice as lawful. In support appellants claim that the practice has always existed as the Commission and Congress have well known.

Having in mind the extensive duties of the Commission, the vast volume of records on file with it, and the varied provisions of the Act, it is clear that it can never be said to have sanctioned any particular interpretation of the statute unless such interpretation was squarely in issue before it for decision.

Appellants point to the Commission's conference rulings, which prescribe a form of pass reading as follows:

> Pass John Smith, President, car, and five officers and employees of the X Y Z Ry. Co.

The Commission has abandoned the practice of making conference rulings. They were not its decisions in a proceeding, wherein it would have had the benefit of a record and the views of opposing counsel. As shown in Exhibit C, attached to the petition (R. 43), they were rescinded *in toto* December 26, 1928.

Appellants also point to the Commission's Regulations to Govern the Form and Recording of Passes which, in the 1917 issue, prescribed a form of pass substantially following that prescribed in its conference rulings. (R. 60.) In prescribing said Regulations to Govern the Form and Recording of Passes, the Commission likewise acted informally and ex parte in that its action was pursuant to section 20,[15] paragraph (5) whereof gives the Commission the following authority:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well

[15] The order of July 30, 1929, which is attacked in the petition as well as the order of November 4, 1929, is not, as alleged in the petition (R. 7), an order within the meaning of section 16 (8) of the Act. Section 20 carries its own penalties, but they are for keeping different records than those prescribed by the Commission or for falsifying records. (34 Stat. 594.)

as of the receipts and expenditures of moneys. * * *

Referring to this contention of appellants the Commission's report reads:

> In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars or both. It might in fact be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars. (R. 36, 37.)

Prior to the proceeding herein involved the practice of transporting free the private cars of other carriers was called to the Commission's attention in three cases only. The Commission's report remarks upon those cases as follows:

> Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge, and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials. (R. 37.)

The decision in the *Tap Line Cases* turned upon the Commission's view that the particular roads

were plant facilities rather than industrial common carriers, and in the *Five Per Cent Case* the lawfulness of the practice was not in issue. So that it is true that these cases can not be claimed by the Commission as squarely holding the practice to be unlawful, for the precise conditions were not presented and passed upon. But it is that very thing that makes the rule of statutory construction invoked by petitioners inapplicable to this case.

The principle of statutory construction, whereby the interpretation given to ambiguous language by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, obviously can not be loosely applied. In the first place, there is no room for the application of any such principle where the language is plain and unambiguous. Appellants are not claiming that the words of the Act have not a plain meaning but rather are attempting to read into the language their own interpretation, that the personal pass permitted by law may carry with it a whole private car. Secondly, unless the administrative body has ruled precisely as to the proper interpretation to be given an ambiguous statute, it is obvious that Congress can not be said to have adopted such interpretation by reenactment of the statute. That is, even assuming ambiguity in the statute under consideration, Congress can not be said to have adopted an ambig-

uous interpretation to cure such ambiguity in its legislation. Having in mind the informal manner in which the form of pass was prescribed by the Commission, the character of the statutory authority under which it acted and the uncertainty as to what it did mean, the Commission's action in this particular can not be regarded as its considered and precise interpretation of the statute. In the *Tap Line Cases* the Commission condemned the use of "car passes" and in the *Five Per Cent Case* it referred to revenue which the carriers might have secured by exacting charges for transportation of private cars. All that can be said of those cases is that the Commission failed to interpret the statute and declare the general practice of transporting free the cars of other carriers unlawful.

In *United States* v. *Mo. Pac. R. R. Co.*, 278 U. S. 269, involving paragraph (4) of section 15 of the Act, which restricts the Commission from requiring carriers to join in through routes that exclude their long hauls, the Commission had construed the paragraph as only protecting the long hauls of originating carriers, or carriers after obtaining possession of the traffic. This construction followed the interpretation given to the paragraph by a long line of decisions of the Commission involving somewhat similar situations. In holding that Congress could not be said to have adopted the interpretation contended for this Court said at pages 279–280:

> And appellants assert that the Commission in a long line of decisions has held that the rule declared in paragraph (4) applies only to traffic in possession of the carriers, and they argue that this construction was impliedly sanctioned by the inclusion of the provision without alteration in Transportation Act, 1920. But the rule that reenactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. *New Haven R. R.* v. *Interstate Commerce Comm'n.*, 200 U. S. 361, 401. The rule has no application in this case because, the decisions by the Commission do not show that it had given paragraph (4) the limited effect claimed by appellants; the order here involved conflicts with that provision; and, if any prior decision of the Commission held that the Act empowered it to establish a through route substantially like the one under consideration, that construction was plainly erroneous and did not attach to or become a part of the provision re-enacted.

In *United States* v. *Erie Railroad*, 236 U. S. 259, the United States had brought suit to enjoin railroads from granting interchange passes to officials and employees of carriers not subject to the Act, namely, certain steamship companies. Counsel for the United States relied upon decisions of the Commission and conference rulings holding that the

right to interchange passes was only with carriers subject to the Act, asserting that Congress, having reenacted the statute, adopted the Commission's construction (262). As against this counsel for the carriers pointed to the fact that the provisions relating to interchange of passes in terms permitted exchange between carriers subject to the Act and other carriers (265). Here again the court showed that decisions of an administrative body must be decisive to be given weight in construing a statute, particularly where the language of the statute permits of a contrary construction. After commenting upon the fact that the rulings of the Commission had never been enforced, the Court gave its attention to the railroads' contention that, if the right of interchange was to be limited to interchanging of passes solely with carriers subject to the Act, qualifying words would have to be interpolated into the Act (265). As to this, it was said at page 270:

> It is not denied that the words "carriers," "common carriers," "railroads" and "railroad companies" are used in the act with and without qualification "subject to the provisions of the act," and the number of times they are so used is compared. It will do no good to set forth the instances. The act was passed to regulate the conduct, and affairs of the carriers of the country, and necessarily they are brought under its provisions and subject to them. It controls their relations, but the carriers subject to the act may have relation with other carriers, and special

> provisions would naturally be made to govern that relation. * * *

Just as in the *Erie Railroad case* it would have been necessary to read words into the provisions relating to interchange of passes in order to sustain the contention that Congress had adopted the construction given those provisions by the Commission, so in the instant case appellants' position is in substance that the proviso allowing personal interchange passes for officials and employees of other railroads as an exception to the basic purpose of the Act to do away with discriminations, should be construed as embracing free transportation and handling of a whole private car along with the passholder.

In *American Express Co.* v. *United States*, 212 U. S. 522, there was involved the question as to whether the provisions of the Act permitting carriers to grant passes to their own officials and employees, and interchange passes to the officials and employees of other carriers embraced permission to grant franks for free transportation of property to such officials and their employees. The court held that the pass provisions of the Act could not be construed to include the transportation of goods, and this despite the fact that it was contended that the custom of issuing franks was of long standing and presumably known to Congress; that there was no record of any protest against it by the Commission, nor any suggestion in any speech in Congress that

it was supposed to be detrimental to the public interest or intended to be prohibited.

In the instant situation it can not be asserted that property rights of any substantial character have been assumed in reliance upon the alleged administrative interpretation, which fact is in sharp contrast with the situation in *Logan* v. *Davis*, 233 U. S. 627, one of the outstanding decisions relating to the weight to be given to an interpretation given to an ambiguous statute by the body charged with its administration. In that case this Court said at page 627:

> • • • Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 595.

Appellants call attention to the fact that the Commission decision in the *Five Per Cent Case* was reported to Congress in its Annual Report. But

there was no issue as to the unlawfulness of the carriers' practice in that case. The most that can be urged by appellants in respect of the decision is that the Commission failed to declare the practice unlawful. If the Commission's oversight to take steps to stop every violation of the Act, which study of the vast volume of tariffs and other records on file with it might disclose, or its failure to take steps to stop every practice, perhaps known to it in a general way but not squarely brought to its attention as a violation of the Act, should be regarded as interpretations sanctioning such violations of law, and the subsequent reenactment of the act by Congress as an adoption of such interpretations, the Interstate Commerce Act would present a mass of provisions as to which the ordinary meaning of words would afford no guide to their proper interpretation and legal meaning.

Furthermore, the Commission's order rests both upon its conclusion that the carriers' practice violates the statutory prohibitions in section 6 and upon its administrative findings that the practice results in unjust discrimination and undue prejudice in violation of sections 2 and 3. Viewed from the administrative standpoint the most that can be urged by virtue of the inclusion of the word "car" in the pass form prescribed is that it was the then judgment of the Commission that the practice did not result in unjust discrimination.

The Commission's failure to prosecute and its alleged past rulings in respect of a form of pass

can not be urged as in any way restricting its present judgment upon administrative questions. If this were not true, once the Commission has found certain practices reasonable and nondiscriminatory, it would thereafter be foreclosed from prescribing any different practices. As said in *Virginian Ry.* v. *U. S.*, 272 U. S. 658, at pp. 665, 666:

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541.

CONCLUSION

The Decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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